Supreme Court, U.S.
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CASE NO. _____

IN THE

Supreme Court Of The United States

WEAVER LEE HAWKINS, IV,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the exceptional circumstances of this case warrant this Court's exercise of its discretionary powers and satisfy this Court that adequate relief cannot be obtained from any other court or in any other form?

2. Whether the determination by this Court that exceptional circumstances exist which warrant this Court's exercise of its discretionary powers and satisfy this Court that adequate relief cannot be obtained from any other court or in any other form should be governed by a "totality of the circumstances" test?

3. Whether the decision of the Alabama Court of Criminal Appeals affirming Petitioner's conviction and the decision of the Alabama Supreme Court denying certiorari resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law as determined by this Court in that Petitioner was convicted on constitutionally insufficient evidence in violation of the Fifth Amendment and contrary to the decision of this Court in *Jackson v. Virginia*, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)?

4. Whether the decision of the Alabama Court of Criminal Appeals affirming Petitioner's conviction and the decision of the Alabama Supreme Court denying certiorari resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding in that the evidence was insufficient as a matter of law to establish the elements of the offense of conviction?

5. Whether the decision of the Alabama Court of Criminal Appeals affirming Petitioner's conviction and the decision of the Alabama Supreme Court denying cer-

tiorari resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law as determined by this Court in that Petitioner was unconstitutionally put to trial a second time in violation of the Double Jeopardy Clause as interpreted by this Court in *United States v. Tateo*, 377 U.S. 463, 464, 468 n. 4, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964); *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976); and *Oregon v. Kennedy*, 456 U.S. 667, 675, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) for the same offense for which his earlier conviction had been set aside because of gross and intentional prosecutorial misconduct justifying a mistrial and intended by the prosecutor to subject the accused to multiple prosecutions in order to afford the prosecution a more favorable opportunity to convict Petitioner resulting from the prosecutor's fear that the jury was likely to acquit the Petitioner?

6. Whether the decision of the Alabama Court of Criminal Appeals affirming Petitioner's conviction and the decision of the Alabama Supreme Court denying certiorari resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law as determined by this Court in that Petitioner was unconstitutionally tried the second time for the same offense for which his earlier conviction had been set aside because of gross and intentional prosecutorial misconduct without first being allowed review by appeal of the merits of the trial court's denial of Petitioner's Double Jeopardy motion to dismiss the charges in violation of the decisions of this Court in *Abney v. United States*, 431 U.S. 651, 662, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *Richardson v. United States*, 468 U.S. 317, 320-322, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984); and *Mitchell v. Forsyth*, 472 U.S. 511, 524, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 6

REASONS FOR GRANTING THE WRIT 14

CONCLUSION 29

CERTIFICATE OF SERVICE 30

APPENDIX A-1

TABLE OF AUTHORITIES

Cases: *Pages*

Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) ..... *passim*

Ex parte Ben-Acadia, Ltd., 566 So.2d 486 (Ala. 1990) 26

Ex parte Bohannon, 564 So.2d 854 (Ala. 1988) 18

Ex parte D. B. (In re D. B. v. State, 678 So.2d 255 (Ala. 1996) 24

Ex parte Hudson, 562 So.2d 248 (Ala. 1990) 26

Ex parte Ziglar, 669 So.2d 133 (Ala. 1995) 26

Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) 14

Houston Lawyers' Association v. Attorney General of Texas, et al, 501 U.S. 419, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991) 14

J. W. B. v. State, 651 So.2d 73 (Ala.Cr.App. 1994) 23

Jackson v. Virginia, 443 U.S. 307 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ..... i, 22

Jones v. State, 450 So.2d 186 (Ala.Cr.App. 1984) 26

Kentucky v. Horton, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979) 14

Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1972) 14

Massachusetts v. Upton, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984) 14

TABLE OF AUTHORITIES (Continued)

Cases: *Pages*

Mitchell v. Forsyth, 472 U.S. 511,
105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) . . . ii, 16, 24, 25

Oregon v. Kennedy, 456 U.S. 667,
102 S.Ct. 2083,
72 L.Ed.2d 416 (1982) . . . . . ii, 26, 27, 28, 29

Posey v. State, 736 So.2d 656
(Ala.Cr.App. 1997), *writ quashed as improvidently granted,* 736 So.2d 661 (1999) 19, 20

Powell v. State, 596 So.2d 652 (Ala.Cr.App. 1992),
denial of post-conviction relief affirmed,
616 So.2d 371 19

Presley v. State, 587 So.2d 1022 (Ala. 1991) 18

Richardson v. United States,
468 U.S. 317 104 S.Ct. 3081,
82 L.Ed.2d 242 (1984) . . . . . ii, 16, 26, 24

Self v. State, 564 So.2d 1023 (Ala.Cr.App. 1989),
writ quashed as improvidently granted,
564 So.2d 1035 (Ala. 1990) 19

State v. Smith, 578 So.2d 1374 (Ala.Civ.App. 1991) . . . 23

Temple v. State, 366 So.2d 740 (Ala.Cr.App. 1978) 20

United States v. Dinitz, 424 U.S. 600,
96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) . . . . . ii, 28

United States v. Tateo, 377 U.S. 463, 84 S.Ct. 1587,
12 L.Ed.2d 448 (1964) . . . . . ii, 27

Vaughn v. State, 473 So.2d 661 (Ala.Cr.App. 1985) . . . 23

TABLE OF AUTHORITIES (Continued)

Statutes: *Page*

28 U.S.C. § § 241(b) 2

28 U.S.C. §§ 2241 2

28 U.S.C. § 2254 ..... *passim*

Ala. Code, § 13A-12-231 (1975) 2, 3, 4, 5, 18, 19, 21

Ala. Code § 13A-12-281 5

Ala. Code § 20-2-2 ..... 2, 18

Ala. Code § 40-17A-4 (1975) 2

OPINIONS BELOW

The revelant orders of the Circuit Court of Jefferson County, Alabama, are reproduced herein as Appendix A.

Petitioner filed on March 2, 1999, in the Alabama Court Of Criminal Appeals a "Motion To Stay Proceedings In The Circuit Court Pending Disposition Of Former Jeopardy Claim". The order of the Alabama Court of Criminal Appeals denying this motion is reproduced herein as Appendix B.

Petitioner immediately filed in the Alabama Court of Criminal Appeals a "Petition For Writ Of Mandamus." A copy of the order denying this motion is reproduced herein as Appendix C.

A copy of the March 18, 1999, Alabama Court Of Criminal Appeals order dismissing the appeal of the denial of the Double Jeopardy motion is attached hereto as Appendix D.

On March 24, 1999, Petitioner filed a "Petition For Writ Of Habeas Corpus" pursuant to 28 U.S.C. § 2254 in the United States District Court For The Northern District Of Alabama alleging that Petitioner had been tried without first being allowed appellate review of his Double Jeopardy claim as required by *Abney v. United States*, 431 U.S. 651, 662, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). A copy of the August 4, 1999, "Magistrate Judge's Report And Recommendation", recommending that this petition be dismissed without prejudice is attached hereto as Appendix E.

The October 22, 1999, Memorandum Opinion of the Alabama Court of Criminal Appeals affirming Petitioner's second conviction is attached hereto as Appendix F.

The order of the Alabama Court of Criminal Appeals dated November 19, 1999, overruling Petitioner's application for rehearing is reproduced at Appendix G.

The order of the Alabama Supreme Court denying certiorari on February 25, 2000, is attached hereto as Appendix H.

A copy of the February 18, 2000, "Memorandum Of Opinion" and order issued by the United States district judge in Petitioner's 28 U.S.C. § 2254 action overruling Petitioner's objections to the "Magistrate Judge's Report And Recommendation" and dismissing the action "without prejudice" is attached as Appendix I.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § § 241(b) and 2254(a).

STATUTES INVOLVED

The statutes and rules involved are set out in Appendix J. These statutes are 28 U.S.C. §§ 2241 and 2254; *Ala. Code*, §§ 13A-12-231 and 20-2-2(15).

STATEMENT OF THE CASE

Petitioner has exhausted available remedies in the Alabama state courts.

Petitioner was indicted in Jefferson County, Alabama on December 19, 1997, in two counts. Count One charged trafficking in marijuana under *Ala. Code*, § 13A-12-231. Count Two charged a failure to pay a drug tax on the marijuana under *Ala. Code* § 40-17A-4 (1975). Count Two was dismissed by the State on July 29, 1998. (R-1)

Petitioner was tried with a co-defendant, Osmond Reynolds, who was charged with the same offense.[1] Both were convicted on July 29-30, 1998, of the same conduct

[1] Reynolds, represented by separate counsel, was the owner of the vehicle at issue in this case and was present in the vehicle at all relevant times.

and the same violation of *Ala. Code*, § 13A-12-231 for which both were retried on March 3, 1999. The trial judge set the first conviction aside on December 3, 1998, pursuant to Petitioner's motion for new trial. (Appendix A) The new trial was granted for prosecutorial misconduct. The prosecutor surreptitiously obtained the State's marijuana evidentiary exhibit from the court reporter after the trial was over, but before the court reporter delivered the exhibits to the jury, and cut open the plastic in which the marijuana was wrapped when introduced into evidence. The prosecutor's motive was to create a strong smell of marijuana in the jury room to provide support for the State's otherwise unsupported theory that Petitioner "constructively possessed" the marijuana because the alleged odor from it inside a vehicle allegedly occupied by the Petitioner must have alerted him to its presence.[2] The exhibit was delivered to the jury in this altered form without the knowledge of the trial court or Petitioner's counsel.

On March 1, 1999, prior to the retrial, Petitioner filed a "Motion To Dismiss Indictment And To Bar Further Prosecution On Grounds Of Former Jeopardy". The trial judge, without holding any hearing, denied the motion on March 2, 1999. (App. A)

Petitioner on March 2, 1999, appealed to the Alabama Court Of Criminal Appeals and filed in the trial court a

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[2] The Alabama Court of Criminal Appeals in its Memorandum affirming Petitioner's conviction described the prosecutor's motivation as follows: "The prosecutor's actions indicate that he believed that the heat-sealed, thick plastic would not let out as much odor as the plastic that had surrounded the marijuana when the officers seized it. . . . we conclude that his goal was to obtain a conviction." (App. F at 7) The marijuana was constantly in the possession of the State from the time of its seizure until it was introduced in this trial. The arresting police officers testified. Therefore, the State had available the means to offer the exhibit into evidence in the form in which it was discovered by the officers. It chose not to do so.

"Motion For Stay Of Proceedings Pending Appeal Of Former Jeopardy Claim". The trial judge denied this motion on March 2, 1999. (App. A)

Petitioner filed on March 2, 1999, in the Alabama Court Of Criminal Appeals a "Motion To Stay Proceedings In The Circuit Court Pending Disposition Of Former Jeopardy Claim". The court denied this motion on March 2, 1999. The order stated, "Petitioner's remedy, if any, lies in filing a petition for writ of mandamus." (App. B)

Petitioner immediately filed in the Alabama Court of Criminal Appeals a "Petition For Writ Of Mandamus". This petition was also denied on March 2, 1999. (App. C)

Petitioner was tried for the second time on the same charges on March 3-4 1999, and convicted of trafficking in marijuana under *Ala. Code*, § 13A-12-231 (1975).

On March 18, 1999, the Alabama Court Of Criminal Appeals entered an order dismissing the appeal of the denial of the Double Jeopardy motion on the ground that "the said appeal be dismissed as a non-appealable order" and that "Review is by filing a petition for writ of mandamus." (App. D)

On March 24, 1999, Petitioner filed a "Petition For Writ Of Habeas Corpus" pursuant to 28 U.S.C. § 2254 in the United States District Court For The Northern District Of Alabama, Case No. CV-99-N-0697-S, alleging that Petitioner had been tried without first being allowed appellate review of his Double Jeopardy claim as required by *Abney v. United States*, 431 U.S. 651, 662, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). Petitioner simultaneously filed a motion to stay the Alabama proceedings. The case was automatically referred to a magistrate judge who took no action on the stay request.

On April 19, 1999, the trial court sentenced Petitioner to ten years in prison, but split the sentence and ordered him to serve three years, imposed a fine of $25,000.00

under *Ala. Code* § 13A-12-231(1)a., and a separate fine of $1,000.00 under *Ala. Code* § 13A-12-281. (App. A; R-344) On May 11, 1999, Petitioner appealed to the Alabama Court of Criminal Appeals. (R-5)

On August 4, 1999, in the 28 U.S.C. § 2254 action, the magistrate judge issued his "Magistrate Judge's Report And Recommendation" (App. E) The magistrate judge took the position that Petitioner had not exhausted his "state remedies" because the "claims raised by [Petitioner] are currently pending before the Alabama Court of Criminal Appeals." (App. E at 3) The magistrate judge recommended that the § 2254 action be dismissed "without prejudice" (*Id.*)

On August 10, 1999, Petitioner filed his objections to the "Magistrate Judge's Report And Recommendation", pointing out to the district judge that the § 2254 action was seeking to halt all the Alabama proceedings pending a review of his Double Jeopardy claim and to protect what was left of Petitioner's right not to be tried at all.

The Alabama Court Of Criminal Appeals on October 22, 1999, affirmed Petitioner's conviction and sentence. The court ruled: (1) Petitioner's right to appellate review of the trial court's order denying Petitioner's pre-trial Double Jeopardy motion was satisfied by the review and denial of the Petitioner's mandamus petition; (2) the trial court had jurisdiction to try Petitioner following the denial of the mandamus petition, even though Petitioner had an appeal of the order of the trial court denying the Double Jeopardy motion pending at the time of the trial and the trial court did not make any finding that the motion was frivolous; (3) there is no merit to the Double Jeopardy claim because a prosecutor's misconduct causing a mistrial will not prevent a retrial, even where the conduct is "overreaching, harassing, intentional and bad faith", unless the conduct was intended to provoke the defendant into moving for a mistrial, and here the

prosecutor's goal "was to obtain a conviction, not to goad the appellant into moving for a mistrial or new trial."; and (4) the State presented sufficient evidence "to show that the appellant constructively possessed the marijuana". (App. F)

Petitioner filed an application for rehearing in the Alabama Court Of Criminal Appeals on November 3, 1999. This petition was denied on November 19, 1999. (App. G)

Petitioner filed a petition for writ of certiorari in the Alabama Supreme Court on December 1, 1999. This petition was denied on February 25, 2000. (App. H)

Finally, on February 18, 2000, the United States district judge issued a "Memorandum Of Opinion" and an order overruling Petitioner's objections to the "Magistrate Judge's Report And Recommendation" and adopting those recommendations as the findings and conclusions of the district court. (App. I)

STATEMENT OF THE FACTS

Petitioner was first tried on the present indictment on July 29-30, 1998, and found guilty by a jury. On December 3, 1998, the trial court granted Petitioner's motion for new trial. The basis on which it was granted was that after the trial had concluded, but before the exhibits were taken into the jury room, the prosecutor obtained possession from the court reporter of the principal piece of evidence in the case, the package containing the marijuana at issue. The prosecutor then cut open the plastic in which the marijuana was wrapped when it was offered into evidence. (App. F at 3-4)

The Alabama Court of Criminal Appeals found that the prosecutor's reason for this surreptitious mutilation of the evidence was to create a strong marijuana smell from the exhibit for the benefit of the jury to support his theory that Petitioner constructively possessed the mari-

juana because he must have smelled the marijuana odor emanating from the package inside the vehicle allegedly occupied by Petitioner. Two police officers testified in the first trial that they initially came to the vehicle because they saw Petitioner urinating near a dumpster and then run over to the vehicle when he saw them. The police officers testified that when they arrived at the vehicle they detected a strong smell of marijuana, though they could not tell whether it was burning marijuana or not. Petitioner and his co-defendant, Reynolds, disputed this "odor" testimony. The court found that the prosecutor cut it open because "he believed that the heat-sealed thick plastic would not let out as much of the odor as the plastic that had surrounded the marijuana when the officers seized it." The court found that the prosecutor "was simply trying to assure that the packaging around the marijuana was similar to the packaging when the police officers seized it so the jury could determine whether the smell of the marijuana was as strong as the officers had testified it had been." (App. F at 7)[3]

The prosecutor deemed it crucial to the case against Petitioner that the jury believe that a strong marijuana smell emanated *from this exhibit.* Only one of the police officers that handled the marijuana exhibit at the scene of the arrest, Chad Clark, testified that he could smell the odor of marijuana coming from the exhibit. Clark was put on as a rebuttal witness at the first trial. (First Trial Transcript-289-290)[4]

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[3] The evidence at the first trial established that the marijuana was wrapped in plastic, placed inside a shoebox, and covered with a large pile of clothes at the time it was found. (First Trial Transcript-91-96) There was no evidence that the marijuana was in a plastic wrapper that had been cut or otherwise left the marijuana open to discharge its odors into the air. The prosecutor could not have been attempting to recreate the condition of the exhibit at the time of the arrest.

[4] A new prosecutor handled the second trial. The new prosecutor made a crucial change in the testimony. In the first trial, the other

Evidence shows the mutilation of the evidence by the prosecutor was planned prior to his closing argument in which he told the jury that the police officers had only searched the vehicle because of the strong odor of marijuana coming from the exhibit at issue in the rear of the vehicle. The prosecutor in his jury argument hinged the credibility of the prosecution case against Petitioner on the presence of a strong marijuana smell from the exhibit package.[5]

However, prior to the prosecutor cutting open the exhibit package, no smell of marijuana emanated from it at all. Randall E. Murphree, the court reporter, testified at the new trial hearing:

> "**Q:** All right. Before the jury began deliberations, were the exhibits that we're referring to — and I don't know which exactly or the numbers they were, but do you recall there being exhibits involving a brick or bricks of a substance alleged to be marijuana and some bags containing loose marijuana?
>
> **A:** Yes. I remember a shoebox with a brick of marijuana in it. I don't remember if there was

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arresting police officer, Warren Givhan, said nothing about any odor from the exhibit. He testified he found the marijuana because he was inventorying the vehicle. (First Trial Transcript-88) However, in the second trial, Officer Givhan testified he continued searching the vehicle after arresting Petitioner and his co-defendant because he smelled a strong smell of marijuana inside the vehicle and saw no ashes to explain it by someone smoking marijuana in the vehicle. He testified the odor led him to the exhibit at issue. (Second Trial Transcript 103) Officer Clark was used as a witness in the case-in-chief at the second trial, but gave no testimony about any odor emanating from the exhibit.

[5] Defense counsel had begun arguing in opening statement that the police officers could not have smelled marijuana from the package because it did not even emit a smell in the more closed atmosphere of the courtroom. (First Trial Transcript-74)

one brick or two bricks, but it was a brick. I do remember that. And it was in plastic.

Q: And prior to the submission of the case to the jury, prior to jury deliberations, these were in your possession; am I correct?

A: That's correct.

Q: . . . Did there come a time when [the prosecutor] prior to the submission of the case to the jury or their deliberations, did [the prosecutor] come back and engage in a conversation with you?

A: Yes.

Q: All right. Would you tell the Court what happened with regard to that?

A: Well, he basically just came back and wanted to know if I had the evidence, the marijuana, the best I remember. And I got it out. He wanted to see it, so I got it out for him at that point.

Q: And what happened then after you got it out for him?

A: He cut it open, took the box—you know, it was in a heat sealed—as the testimony was stated—from the Department of Forensic Sciences. And he sliced it open, but just the top part.

Q: All right. Did he say anything with regard to you prior to cutting it open concerning the smell?

A: He did but I don't—I couldn't quote what he said. I don't remember exactly what he said. I just remember that he was going to open it up to where it would be like it was when they—I think when they found it, basically.

Q: Okay. But do you recall telling me this morning—when I was asking you concerning what was stated, do you recall telling me that [the prosecutor] came in and said something to

the effect that the jury would not be able to smell it and that then—

A: Yeah, that's right.

Q: Is that correct?

A: That's correct, yes. (New Trial Hearing Transcript, pages 22-24).

Q: You could see marijuana. *And did the smell start to emanate from the bag at that time, if you remember?*

A: *Well, it did eventually, yes. Not all at—you know, it took a few—a little while, I think to the best of my memory. The longer it was open.* Because the box —see, the top was put back on it. He put the top back on it.

Q: *But when it was in your room sealed with the top on it, you didn't smell it, did you?*

A: *Well, no.*" (emphasis supplied) (New Trial Hearing Transcript, pages 28-29).

The prosecutor formed the secret intent to alter the exhibit when he prepared his closing argument. He argued to the jury that it would be able to smell the marijuana. He knew the exhibit in the form in which it had been admitted into evidence exuded no odor of marijuana. He knew then he had to cut open the exhibit. He waited until the trial court and opposing counsel were absent. He was afraid he had lost and was willing to win by foul means.

The case was retried on March 3-4, 1999, with a new prosecutor:

Officer Warren Givhan of the Birmingham Police Department testified that he was on patrol with Officer Chad Clark around midnight on November 29, 1996, when he observed a black male urinating in a parking lot near a dumpster. (*Id.*-96) The individual, Petitioner, "attempted" to jump in a nearby Toyota Forerunner as the police car approached. Officer Givhan and his partner

approached the vehicle from opposite sides, Givhan being on the driver's side. Petitioner stepped out from the driver's seat "and I told him he was under arrest for public lewdness." (*Id.*-97) Givhan testified that, "Well, once I approached the vehicle, the door was still open, and I detected a loud smell of marijuana protruding from the vehicle." (*Id.*-98) Givhan turned him over to the other policeman. Givhan then asked Petitioner's co-defendant, Reynolds if he had any marijuana. Reynolds said he did. (*Id.*-99) Reynolds removed and delivered to Givhan a small bag of marijuana from his crotch area. Givhan cuffed Reynolds and put him in the police car. The remaining two black males sitting in the rear seat were "patted down", cuffed, and placed in a second police car. Givhan then began "inventorying" the vehicle. (*Id.*-101). There continued to be a strong smell of marijuana in the interior of the vehicle. In the luggage area of the vehicle under a large pile of clothes, Givhan found "a big block of marijuana" in a shoebox. (*Id.*-103) Scales were also found in the shoebox. (*Id.*-110) There was considerable clothing piled on the shoebox. (*Id.*-121) The marijuana inside the shoebox was wrapped in plastic. (*Id.*-123) Reynolds and his grandmother jointly owned the vehicle. (*Id.*-124) No contraband was found on Petitioner. (*Id.*-132) Givhan did not know if the marijuana smell was burning or non-burning marijuana. (*Id.*-132-133) Givhan does not know if someone smoked marijuana in the vehicle while Petitioner was outside the vehicle. (*Id.*-134)

Officer Chad Clark of the Birmingham Police Department testified there was no doubt marijuana was "either in the vehicle or someone had smoked it in the vehicle." (*Id.*-149) Reynolds had the smell of marijuana on him when he was put in the police car. (*Id.*-154)

Detective Jeff Steele of the Birmingham Police Department testified he was the "on-call" narcotics detective on November 29, 1996. (*Id.*-157) He was called at 12:45 a.m.

and went to scene. (*Id.*-158) He provided "chain of custody" testimony. (*Id.*-160-163)

Danny Kirkpatrick, a police forensic scientist testified that the substances taken from the vehicle were, respectively, marijuana and cocaine. (*Id.*-187; 189-190) The weight of the "block" of "plant material", some of which tested as marijuana, taken from the rear of the vehicle was 1,167.2 grams. (*Id.*-186)

The State rested its case. Petitioner moved for a judgment of acquittal based on the insufficiency of the evidence. The motion was denied.

Petitioner presented as character witnesses *Wilda Adams* (*Id.*-199-202), *Reverend Zachary Overton Id.*-176-180), *John C. Prince, II*, a major in the Atlanta police department (*Id.*-172-176), *Lanora Carson* (*Id.*-270-273), and *Bryan Ruggs* (*Id.*-274-279), all of whom testified to his reputation for truthfulness and that he did not use marijuana.

Co-defendant *Osmond Reynolds* testified that at the time of the arrest, the group in the vehicle was on the way to a football game to be held in New Orleans. The trip originated in Nashville. The group had come through Birmingham to attend a birthday party for Petitioner's grandmother. The Toyota Forerunner was a vehicle titled jointly to Reynolds and his grandmother. The vehicle was packed in Nashville. Reynolds saw no marijuana bricks. Petitioner and Reynolds packed separately, but put the clothes in the vehicle together. (*Id.*-220-224) The shoebox was not in the vehicle when the clothes were loaded. (*Id.*-224-225) Another person had possession of the vehicle for two hours after Reynolds and Petitioner packed. (*Id.*-225-226) Petitioner drove to Birmingham. (*Id.*-226) The group went to Southside Birmingham. Reynolds withdrew money from an ATM. He left the vehicle in the bank parking lot and went to a Southside Birmingham club. The group left without going in be-

cause the line was too long. (*Id.*-229-231) They returned to the vehicle. Reynolds and Petitioner went behind the dumpster in the parking lot to urinate. Reynolds returned first to the vehicle. (*Id.*-231-232) Reynolds never saw the shoebox until the police removed it from the vehicle. (*Id.*-234) He did not smell marijuana in the vehicle on the drive to Birmingham, though he was sitting in the back seat. There was no cocaine in the glove box before the trip. (*Id.*-235-237) No one ever smoked marijuana in the car. (*Id.*-240) Petitioner was never in the back seat of the vehicle. (*Id.*-241) Reynolds never saw the pistol before. (*Id.*-243)

Petitioner testified that he packed his clothes in the vehicle in Nashville individually. (*Id.*-251) He verified that another person took the vehicle away to pack his clothes in the vehicle individually. (*Id.*-253) The fourth passenger packed his clothes in the vehicle individually. (*Id.*-255) Petitioner was arrested and cuffed before he "really got into the vehicle, but I was in the process of getting into it." (*Id.*-257-258) He had never seen the shoebox before the police removed it from the vehicle. (*Id.*-259-260) He had not gone into the glove box and did not know what was in it. (*Id.*-260) He never looked under the driver's seat and never saw the pistol. He did not smell marijuana in the vehicle before he urinated and had no chance to do so before he was arrested. (*Id.*-261) He denied the marijuana was his or that he knew who put it in the vehicle.

The second jury convicted the Petitioner and his co-defendant, Reynolds, the owner of the vehicle. Both are presently incarcerated.

REASONS FOR GRANTING THE WRIT

I.

The "totality of the circumstances" establishes that the exceptional circumstances of this case warrant this Court's exercise of its discretionary powers and should satisfy this Court that adequate relief cannot be obtained from any other court or in any other form.

The decisions of this Court do not explain what reasons do and do not satisfy the requirement of Rule 20.4(a), Rules of the Supreme Court of the United States, that to justify the granting of the writ of habeas corpus the Petitioner must show that "exceptional circumstances" warrant the Court in exercising its discretionary powers and that "adequate relief" cannot be obtained in any other form or from any other court. In *Felker v. Turpin*, 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996), the Court stated only that neither of Felker's claims "satisfies the requirements of the relevant provisions of the Act, let alone the requirement that there be "exceptional circumstances" justifying the issuance of the writ."

Petitioner submits that the appropriate test to be employed in judging whether "exceptional circumstances" exist and whether "adequate relief" can be otherwise obtained should be a "totality of the circumstances" test. This Court has favored such a test in many diverse areas. See, *e. g.*, *Manson v. Braithwaite*, 432 U.S. 98, 112, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1972) (admission of identification of defendant following suspect confrontation by witness); *Houston Lawyers' Association v. Attorney General of Texas, et al*, 501 U.S. 419, 426, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991) (applying Voting Rights Act); *Kentucky v. Horton*, 441 U.S. 786, 788, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979) (evaluating effect of failure to give requested presumption of innocence instruction); and *Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721

(1984) (determining constitutional validity of search warrant).

The "totality of the circumstances" in the instant case shows that this case meets the standard for the exercise of this Court's discretionary issuance of a writ of habeas corpus. First, Petitioner claims he is actually innocent. Second, there was a failure at both trials to produce constitutionally sufficient evidence to convict him. Third, Petitioner was only convicted in the first trial because of the gross and intentional misconduct of the prosecutor in secretly altering previously admitted evidence to create a false exhibit to influence the jury. Fourth, Petitioner was denied his right to prevent a second trial under the Double Jeopardy Clause. Fifth, the consistent denial of Petitioner's rights has been the result of the refusal of the Alabama Supreme Court to follow the decisions of this Court. Sixth, Petitioner has been denied his constitutional right to a pre-trial *appeal* of the ruling of the trial court denying his Double Jeopardy motion to dismiss. Seventh, Petitioner has already been denied a very substantial portion of his right against being placed in double jeopardy by being required to stand trial in violation of the Double Jeopardy Clause. Eighth, Petitioner is now incarcerated and will remain incarcerated until he is granted a writ of habeas corpus, which, if this Court does not now hear this case, will mean that he will serve all or most of the sentence imposed upon him before obtaining vindication of his double jeopardy rights.[6] Ninth,

[6] Petitioner filed a 28 U.S.C. § 2254 action in the United States District Court for the Northern District of Alabama on March 24, 1999, after the Alabama Court of Criminal Appeals on March 18, 1999, dismissed Petitioner's appeal of the pre-trial order of the trial court denying the Double Jeopardy motion to dismiss. Petitioner sought in the Federal court a stay of the Alabama state court proceedings until the Federal courts decided his *Abney* claim since the Alabama state courts had refused to follow *Abney*. Even though no claim was then pending in the Alabama state courts seeking to stop

there is no Federal or State remedy to compensate him for being imprisoned in violation of his Double Jeopardy rights so that his unconstitutional loss of freedom cannot be remedied except in this proceeding. Tenth, Petitioner contends that if Alabama had not chosen to deliberately disregard the decisions of this Court and had granted Petitioner's right to pre-trial appellate review of the denial of his Double Jeopardy claims as clearly mandated by this Court in *Abney v. United States*, 431 U.S. 651, 662, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *Richardson v. United States*, 468 U.S. 317, 320-322, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984); and *Mitchell v. Forsyth*, 472 U.S. 511, 524, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), then he would not now be in such unconstitutional straits. This Court has made clear that the Double Jeopardy right has the added dimension of pre-trial vindication that is essential to the full enjoyment of the right. What remains of Petitioner's double jeopardy right is entitled to special protection by this Court.

This case also presents an issue of national significance, to-wit, where prosecutors believe the State is in danger of losing a criminal case and engage in clearly wrongful conduct prejudicial to the defendant to improve the State's chances of winning the case, but which is concealed from the defense until after a conviction is obtained, is the only remedy a retrial?[7]

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the proceedings because of Petitioner's *Abney* right not to go through the trial-sentencing-appeal procedure, it was February 18, 2000, before the district court dismissed without prejudice Petitioner's § 2254 claim on the ground that he had not exhausted his state remedies because the same claims were pending in state courts as in the district court. Whatever the reason the Federal court did not respond in time to protect Petitioner's *Abney* rights.

[7] The Alabama Court of Criminal Appeals ruled: "From the evidence before us, we cannot conclude that the prosecutor intended to goad the appellant into moving for a mistrial or a new trial. Rather, it appears that he was *simply* trying to *assure* that the packag-

Heretofore, prosecutors have constitutionally established the circumstances surrounding events which took place outside the courtroom by presenting witnesses to testify as to those circumstances who could be confronted and cross-examined by the defendant. The prosecutor had one of the police officers identify the exact piece of plastic in which the marijuana had been "wrapped" when found, but did not introduce any evidence that the plastic had been arranged so as to leave the marijuana exposed to the air. (*Id.* at 94) It would certainly have been possible prior to trial to place the marijuana in the plastic in which it had been wrapped when found and introduce it into evidence in that form.

This Court has the jurisdiction and the authority under 28 U.S.C. § 2254(d)(1) and (2) to deal with this perversion of the Double Jeopardy Clause and the decisions of this Court construing it. The decision of the Alabama Court of Criminal Appeals constitutes both a decision that was contrary to, or involved an unreasonable application of clearly established federal law as determined by this Court and a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The "totality of the circumstances" mandates the exercise of the discretionary powers of this Court.

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ing around the marijuana was similar to the packaging when the police officers seized it so the jury could determine whether the smell of marijuana was as strong as the officers had testified it had been. The prosecutor's actions indicate that *he believed* that the heat-sealed, thick plastic would not let out as much of the odor as the plastic that had surrounded the marijuana when the officers seized it. Although we do not condone the prosecutor's conduct, we conclude that *his goal was to obtain a conviction*, not to goad appellant into moving for a mistrial or a new trial. *See Spears, supra.* Accordingly, the appellant's argument that his retrial violated double jeopardy principles is without merit." (emphasis added) (App. F at 7)

II.

The decision of the Alabama Court of Criminal Appeals affirming Petitioner's conviction and the decision of the Alabama Supreme Court denying certiorari resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding in that the evidence was insufficient as a matter of law to establish the elements of the offense of conviction.

The elements of the offense of which Petitioner was convicted, *Ala. Code*, § 13A-12-231 (1975), are that the accused was (1) in possession of (2) more than 2.2 pounds of marihuana. The state's burden of proving the Petitioner possessed in excess of 2.2 pounds of marihuana is not simply to prove that the plant material and seeds it weighed contained marihuana; rather, the state must also prove the weight of the marihuana, as the term is defined by subdivision (15) of *Ala. Code* § 20-2-2. *Ex parte Bohannon*, 564 So.2d 854, 858 (Ala. 1988). *Ala. Code* § 20-2-2(15), *Presley v. State*, 587 So.2d 1022, 1025 (Ala. 1991)

The Alabama Court of Criminal Appeals held that the sufficiency of the evidence must be judged based only on the evidence as of the conclusion of the State's case. (App. F at 8) Petitioner has no quarrel with this conclusion.

The State failed to make any effort to prove the "weight" did not include the excluded material. The State's forensic scientist witness, Danny Kirkpatrick, testified that the "plant material", which earlier witnesses identified as that found in the rear of the vehicle, had a "total weight" of 1,167.2 grams. (R 183) There is no testimony that this weight excluded any of the materials listed in § 20-2-2(15). The State thus failed to meet the proof requirements for the first element of a violation of *Ala. Code*, § 13A-12-231 (1975).

Possession is shown by three attributes: (1) actual or potential control; (2) intention to exercise dominion; and (3) external manifestations of intent and control. *Self v. State*, 564 So.2d 1023, 1026 (Ala.Cr.App. 1989), *writ quashed as improvidently granted*, 564 So.2d 1035 (Ala. 1990) (Evidence insufficient to show defendant's possession of drugs in truck parked on defendant's property though defendant working nearby at time of search locating drugs, but even if possession had been shown the evidence would be insufficient to show defendant's knowledge of presence of drugs.)

In order to prove actual possession, the State must show that the defendant had actual or potential physical control of the controlled substance; that he had intent to exercise dominion over the controlled substance; and that he manifested intent and control. *Powell v. State*, 596 So.2d 652, 654 (Ala.Cr.App. 1992), *denial of post-conviction relief affirmed*, 616 So.2d 371 (Evidence of actual possession where defendant took possession of briefcase containing drugs preparatory to opening it for the purpose of examining the drugs.)

The applicable Alabama law on the requirements of proof of constructive possession is set out in *Posey v. State*, 736 So.2d 656, 658-659 (Ala.Cr.App. 1997), *writ quashed as improvidently granted*, 736 So.2d 661 (1999). The court held that the evidence was insufficient to establish the defendant's constructive possession of methamphetamine found in the refrigerator of a trailer owned by him where there were four other adults in the trailer at the time of the search which found the drugs and at least one of them was in actual possession of some methamphetamine. The State's evidence that the defendant owned the trailer and was present in the trailer at the time the drugs were found was held to be insufficient proof of constructive possession to sustain a jury verdict convicting the defendant of drug trafficking in violation of *Ala. Code*, § 13A-12-231 (1975).

The *Posey* court held:

> "'. . . the mere presence of the accused in a place where the controlled substance is found is not in and of itself evidence of possession.' . . . When constructive possession is relied on, the prosecution must also prove beyond a reasonable doubt that the accused had knowledge of the presence of the controlled substances. [citations omitted] This knowledge may be inferred from the accused's *exclusive possession, ownership, and control of the premises. Temple v. State*, 366 So.2d 740 (Ala.Cr.App. 1978). When the accused is *not in exclusive possession* of the premises, however, this knowledge may not be inferred unless there are other circumstances tending to buttress this inference." [citations omitted] (emphasis added) (736 So.2d at658)

The *Posey* court also found as a factor requiring reversal of Posey's conviction that one of the other adults in the subject trailer actually had drugs on his person. (*Id.* at 659) Of course, that is exactly the situation in the instant case.

Finally, the *Posey* court held that where the prosecution relied on circumstantial evidence, the evidence must exclude "'to a moral certainty, every other reasonable hypothesis, but that of the guilt of the accused. No matter how strong the circumstances, if they can be reconciled with the theory that some other person may have done the act, then the defendant is not shown to be guilty, by that full measure of proof that the law requires.'" [citations omitted] (*Id.* at 660)

The foregoing statement of Alabama law establishes that the decision in this case "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (28 U.S.C. 2254(d)(2)) The only evidence at the close of the State's case was that Petitioner was seen urinating in a public

place, nearby, but outside, the vehicle in which the drugs were subsequently found; that when the police moved toward him, Petitioner ran to the driver's door of the vehicle and either was getting ready to sit or had just sat in the driver's seat when he was arrested; that there were three other adults in the vehicle at the time, one of whom was the owner of the vehicle; that marijuana was found on the person of the owner of the vehicle and he was arrested; that there was an odor of marijuana coming from the vehicle; that "plant material" from which a strong marijuana odor emanated was found in the rear of the vehicle; and that the total weight of the "plant material" removed from the rear of the vehicle was 1,167.2 grams. Under the applicable Alabama law, this evidence was insufficient as a matter of law to establish either element of a violation of *Ala. Code*, § 13A-12-231 (1975).

Warren Givhan, one of the police officers who smelled the "odor", testified as follows:

> "**Q:** Now, when you came upon the vehicle and you came up to the door, you took [Petitioner] out and you smelled marijuana; correct? You smelled the odor of marijuana?
>
> **A:** Yes, sir, yes, sir.
>
> **Q:** You don't know—as you told the District Attorney—you don't know if it was the smell of burned marijuana, or it was marijuana in the back of the car; you just don't know?
>
> **A:** Right.
>
> . . .
>
> **Q:** And, you can't really tell the jury to any degree of certainty that someone had smoked marijuana in that car prior to [Petitioner] getting in there; correct?
>
> **A:** I couldn't tell.

The other police officer testified: "There was a distinct odor of marijuana the whole time. I mean, it was very distinctive. It was no doubt that it was marijuana either in the vehicle or someone had smoked it in the vehicle."

Thus, even though a marijuana "odor" was present when the police arrived at the vehicle immediately after Petitioner arrived there, there is no evidence as to the source of this odor and no evidence that the odor was present even if Petitioner had earlier been an occupant of the vehicle.

III.

The decision of the Alabama Court of Criminal Appeals affirming Petitioner's conviction and the decision of the Alabama Supreme Court denying certiorari resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law as determined by this Court in that Petitioner was convicted on constitutionally insufficient evidence in violation of the Fifth Amendment and contrary to the decision of this Court in *Jackson v. Virginia*, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The evidence was insufficient to support Petitioner's conviction beyond a reasonable doubt under this Court's decision in *Jackson v. Virginia*, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *Jackson* held that in a challenge to a state conviction brought under 28 U.S.C. § 2254, the petitioner is entitled to habeas relief if it is found that upon the evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

Jackson also hold that there must be more than a "mere modicum" of evidence to satisfy the constitutional standard, a "mere modicum" being defined as "any evidence that is relevant-that has any tendency to make the existence of an element of a crime slightly more probable

than it would be without the evidence." (*Id.*) A defendant against whom there is but one slender bit of evidence would be denied due process upon conviction even if the jury had been properly instructed on the reasonable doubt standard and requirements. (*Id.* at 320 n. 14).

The core of *Jackson*'s interpretation of the Fifth Amendment is that rational decision making cannot take place in the absence of substantial evidence on which the decision can be based. There is no substantial or meaningful evidence showing that Petitioner possessed the marijuana. There is no evidence that the "marijuana", as defined by Alabama law, weighed the requisite amount excluding the items required by statute to be excluded from the weight. *Jackson* requires reversal.

The evidence was insufficient to convict Petitioner under Alabama law. *J. W. B. v. State*, 651 So.2d 73, 75 (Ala. Cr. App. 1994) (The action of the trial court in denying a motion to exclude the evidence must be reviewed by determining whether there existed legal evidence before the jury *at the time the motions were made*, from which the jury by fair inference could have found the defendant guilty beyond a reasonable doubt.")

Even if there was proof from which the jury could infer that Petitioner was ever in the vehicle, the mere presence of an accused in an automobile containing drugs is not sufficient to establish that the accused had knowledge of their presence. *Vaughn v. State*, 473 So.2d 661, 664 (Ala.Cr.App. 1985). See also, *State v. Smith*, 578 So.2d 1374, 1376 (Ala. Civ. App. 1991) ("Finally, there is no showing that Boykin, the driver of Smith's car, had any knowledge, possession or control of the marijuana found in [his female passenger's] purse. To hold otherwise would be to allow a stranger, having possession of a controlled substance and being a passenger in a vehicle, to be the basis for forfeiture of that vehicle. *This fact situation could not be the basis of a criminal conviction for possession*

of controlled substance and should not, therefore, be the basis of a forfeiture . . . "(emphasis added)); *Ex parte D. B. (In re D. B. v. State*, 678 So.2d 255, 257 (Ala. 1996) ("The mere presence of a defendant in an automobile containing contraband is not sufficient in and of itself to support a conviction for possession of a controlled substance. . . . Knowledge of the presence of the controlled substance must also be established beyond a reasonable doubt. . . . The possibility that a thing may occur is not alone evidence even circumstantially that the thing did occur.") There is no substantial evidence linking Petitioner to the marijuana.

The decision of the Alabama Court of Criminal Appeals affirming Petitioner's conviction is, therefore, "an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1)

IV.

The decision of the Alabama Court of Criminal Appeals affirming Petitioner's conviction and the decision of the Alabama Supreme Court denying certiorari resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law as determined by this Court in that Petitioner was unconstitutionally tried the second time for the same offense for which his earlier conviction had been set aside because of gross and intentional prosecutorial misconduct without first being allowed to have an appellate court review the merits of the trial court's denial of Petitioner's Double Jeopardy motion to dismiss the charges in violation of the decisions of this Court in *Abney v. United States*, 431 U.S. 651, 662, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *Richardson v. United States*, 468 U.S. 317, 320-322, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984); and *Mitchell v. Forsyth*, 472 U.S. 511, 524, 105

S.Ct. 2806, 86 L.Ed.2d 411 (1985) because the Alabama appellate courts unconstitutionally refused prior to trial to review by appeal a trial court's pre-trial denial of Petitioner's Double Jeopardy claims?

In *Abney v. United States*, supra, this Court held that the Fifth Amendment's Double Jeopardy protection extends to even "the risk" that a criminal defendant will be convicted of an offense for which he has been tried. "Because of this focus on the 'risk' of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." 431 U.S. at 661.

In *Mitchell v. Forsyth*, 472 U.S. 511, 524-525, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), this Court stated, "When a district court has denied a defendant's claim of right not to stand trial, on double jeopardy grounds, for example, we have consistently held the court's decision *appealable*, for such a right cannot be effectively vindicated after the trial has occurred. [citing *Abney*]" (emphasis added)

In *Richardson v. United States*, 468 U.S. 317, 320-321, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), this Court held that unless criminal defendants could obtain interlocutory review of their Double Jeopardy claims prior to the retrial, a major aspect of the protection afforded by the Double Jeopardy Clause would be lost. Therefore, "'. . . if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.'" (468 U.S. at 321, quoting *Abney*, 431 U.S. at 662)

The Alabama Court Of Criminal Appeals ruled that the only way under Alabama law that a criminal defendant can obtain any pre-trial appellate review of a trial judge's order denying a pre-trial motion to dismiss the

indictment based on Double Jeopardy is by filing a petition for a writ of mandamus. (App. F at 2)

A writ of mandamus is a drastic and extraordinary remedy under Alabama law. It is not a substitute for appeal. *Ex parte Ben-Acadia, Ltd.*, 566 So.2d 486 (Ala. 1990) and *Ex parte Hudson*, 562 So.2d 248 (Ala. 1990). Therefore, the Alabama procedure of reviewing only on a petition for a writ of mandamus the denial of pre-trial motions based on Former Jeopardy is constitutionally inadequate.

The Alabama courts have simply refused to follow this Court's decision in *Abney*. The court in *Jones v. State*, 450 So.2d 186, 187 (Ala.Cr.App. 1984) held as follows:

> Although we realize there is a split of authority, we take the view that a denial of a pretrial motion based on a plea of double jeopardy is not immediately appealable."

In *Ex parte Ziglar*, 669 So.2d 133, 135 (Ala. 1995), the court for the first time authorized general review of the pre-trial denial of Double Jeopardy based motions to dismiss by a petition for writ of mandamus.

Moreover, the Alabama Court of Criminal Appeals denied Petitioner post-trial relief in direct violation of another decision of this Court, *Oregon v. Kennedy*, 456 U.S. 667, 675, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), where this Court held:

> "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial *absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. . . .* "

What is the rule as stated by this court where, as here, the prosecutor successfully conceals his misconduct from the defendant until after the jury verdict he desires has been obtained? Had Petitioner learned of the cutting

open of the exhibit after it was submitted to the jury, but prior to the verdict, he would have sought and obtained a mistrial. In that event, *Kennedy* would have prevented a retrial. Surely, Petitioner is not to be tried and convicted a second time solely because the prosecutor in his case was successful in concealing his misconduct until after the verdict was returned. Such a rule of law would reward prosecutors who are losing, or fear they are losing, a case, and who seek to change the situation by secretly acting to prejudice the jury because the worst that would happen if the prosecutor is caught is that the defendant would be retried.

This Court has clearly held that such a result is not permissible. In *United States v. Tateo*, 377 U.S. 463, 464, 468 n. 4, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964), the Court decided that a federal criminal defendant who has had his conviction overturned in collateral proceedings on the ground that a guilty plea entered by him during trial was not voluntary but induced in part by comments of the trial judge, may be tried again for the same crimes and is not protected against such a prosecution by the Double Jeopardy Clause of the Fifth Amendment. This Court was careful, however, to qualify its decision by holding that, "If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain." (377 U.S. at 468 n. 4)

This holding was reaffirmed in *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). This Court held there as follows:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or pros-

> ecutor," *United States v. Jorn*, supra, 400 U.S., at 485, 91 S.Ct., at 557, threatens the "(h)arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. *Downum v. United States*, 372 U.S. at 736, 83 S.Ct., at 1034, 10 L.Ed.2d, at 102. See *Gori v. United States*, 367 U.S., at 369, 81 S.Ct., at 1526, 6 L.Ed.2d 905; *United States v. Jorn*, supra, 400 U.S., at 489, 91 S.Ct. at 559, 27 L.Ed.2d at 558 (Stewart, J., dissenting); cf. *Wade v. Hunter*, 336 U.S. at 692, 69 S.Ct., at 838, 93 L.Ed., at 979."

Petitioner recognizes that this Court in the *Kennedy* case modified this language in the mistrial context to require an "intent to goad" test and made clear that the application of such a test by the State courts would be monitored by the Federal courts on petitions for writ of habeas corpus.[8] However, there is nothing in *Kennedy* to indicate that where, as here, the concealment of intentionally wrongful prosecutorial conduct until after the verdict, where such conduct would meet the "intent to goad" test if it had been known to the defendant prior to the verdict, successfully avoids the application of the Double Jeopardy Clause. There was an intent by the prosecutor in the instant case to subject the accused to mul-

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[8] "... a standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system. When it is remembered that resolution of double jeopardy questions by state trial courts are reviewable not only within the state court system, but in the federal court system on habeas corpus as well, the desirability of an easily applied principle is apparent." (456 U.S. at 675)

tiple prosecutions in order "to afford the prosecution a more favorable opportunity to convict" the defendant."

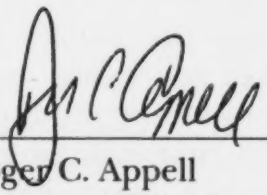
The Alabama Court of Criminal Appeals erred in holding in the instant case that retrial is not barred because the motive of the prosecutor in cutting open this exhibit was not to goad the defense into moving for a mistrial, but was instead to convince the jury there was a strong odor of marijuana in the automobile while it was occupied by Petitioner and thus enhance the prosecution's chances of winning the case. (App. F at 3-7) This motivation is, of course, behind every "goad" to a mistrial. If the complained of intentional prosecutorial misconduct did not increase the prosecution's chance of winning the case, or decrease the defendant's chance of winning, no defendant would be "goaded" in the *Kennedy v. Oregon* sense into moving for a mistrial. Therefore, the Alabama Court of Criminal Appeals has issued an opinion in this case which is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1)

CONCLUSION

Petitioner submits that there are present in the instant case exceptional circumstances which warrant this Court's exercise of its discretionary powers and which ought to satisfy this Court that adequate relief cannot be obtained from any other court or in any other form. The decision of the Alabama Court of Criminal Appeals, the pivotal decision in this matter, is a decision that was contrary to, or involved an unreasonable application of clearly established federal law as determined by this Court and resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Consequently, this Court ought to issue a writ of habeas corpus, reversing Petitioner's conviction, and ordering his imme-

diate release. Alternatively, if this Court is of the opinion that an evidentiary hearing is necessary, then Petitioner should be released on his own recognizance or appropriate bail pending disposition of this proceeding.

Respectfully submitted,



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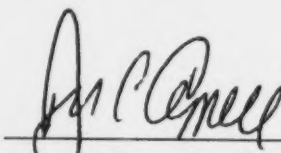
CERTIFICATE OF SERVICE

I certify that I have this 9 day of June, 2000, served two copies of this petition for a writ of habeas corpus on the Attorney General of Alabama, 11 South Union Street, Montgomery, Alabama 36130-0152, by U. S. Mail, postage prepaid and properly addressed.



Roger C. Appell